LWG
LOWER WILLAMETTE GROUP

Via Overnight Mail

July 12, 2013

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Re: Combined Notice of Objection to and Request for Dispute Resolution of EPA's Notice of Demand for Payment of Stipulated Penalties Regarding Baseline Human Health Risk Assessment and Request for Determination; Lower Willamette River, Portland Harbor Superfund Site, USEPA Docket No: CERCLA-10-2001-0240

Dear Director Albright, Mr. Humphrey and Ms. Koch:

This dispute arises out of EPA's June 22, 2012, finding, without explanation, that the Lower Willamette Group had failed to comply with the Consent Order for the Portland Harbor RI/FS. That finding was accompanied by EPA's direction to the LWG to make wholesale revisions to the May 2011 draft final Baseline Human Health Risk Assessment that directly contravened longstanding agreements between EPA and the LWG about the content of the BHHRA.[1] Some five weeks later, on Friday, July 27, 2012, EPA finally explained the notice of noncompliance by providing the LWG with a list of just 17 (out of a total of 223) EPA comments on the 2009 draft of the BHHRA that the LWG allegedly failed to address adequately in the May 2011 draft. By the following Tuesday, July 31, the LWG had agreed to work from EPA's revised version of the BHHRA and limit further negotiations to significant issues "with

[1] EPA later characterized the revisions as not "chang[ing] the calculations or analysis that made up the majority of the work and effort doing the risk assessment" but just "words ... moved to other locations and/or redundancies eliminated." EPA's October 12, 2012, submission to Director Dan Opalski, p. 3, attached as Exhibit 1.

technical or factual substance."[2] Neither the LWG nor EPA ever took the position that the 17 comments on the July 27 list were of "technical or factual substance." Ultimately, Director Opalski allowed EPA's noncompliance finding to stand with respect to 13 of these comments, which corresponded to just five of the June 22 directed text revisions.[3]

For this, EPA has now fined the LWG $125,500.

Even before EPA provided an explanation for the notice of noncompliance, EPA offered to withdraw the notice if the LWG would agree to waive its right to dispute all of EPA's June 22 revisions. The LWG declined this offer, because the 99.9 percent of EPA's revisions that EPA ultimately said were unrelated to the notice of noncompliance included major changes to the technical content of the BHHRA that had the potential to impact remedy selection. The dispute resolution process, particularly the negotiations prior to the LWG's submission of three narrow issues to Director Opalski for resolution, resulted in significant improvements in the content of the final BHHRA, which EPA approved on April 3, 2013. Because the LWG pushed back on these important technical issues in the BHHRA, however, EPA persisted in its enforcement action and has now assessed the LWG an unprecedented stipulated penalty based on a few minor editorial issues that the LWG agreed to resolve within a few days after EPA identified them. This penalty is not the mere close-out of an administrative proceeding; it is punishment for the LWG's exercise of its right under the Consent Order to seek senior EPA management review of staff decisions on important technical issues.

No environmental harm, risk to public health, or delay in completion of the RI/FS resulted from the way the LWG addressed EPA's comments on the 2009 draft BHHRA. EPA's decision to address its editorial concerns through the enforcement context and the issuance of an unprecedented fine will reverberate beyond the LWG to the more than 100 other responsible parties who will ultimately be asked to participate in the cleanup of Portland Harbor. PRPs may be extremely reluctant to agree to perform millions of dollars of cleanup work if they know they risk penalties should EPA decide, without warning, that they have not responded adequately to a single EPA comment. EPA's interest in assuring responsible parties – and the community – that it is focused on quickly moving to the implementation of protective remedies through settlement should greatly outweigh the agency's interest in recovery of monetary penalties arising out of a good faith misunderstanding regarding minor word choices.

For all the reasons set forth in this letter, we ask you to withdraw the penalty assessment.

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[2] Yamamoto August 1, 2012, email to Wyatt, attached as Exhibit 2.

[3] EPA's complaints about the LWG's response to four of the 17 comments were withdrawn by EPA or rejected by Director Opalski. EPA's June 22 version of the BHHRA did not itself include the revisions sought by seven of the comments, and one comment was on the executive summary, which was deleted entirely by EPA (although the EPA had previously told the LWG to include an executive summary in the BHHRA). The LWG never challenged the five remaining revisions.

Notice of Objection

The LWG objects to EPA's letter to the LWG dated April 10, 2013, which provided notice of an assessment and demand for a stipulated penalty in the amount of $125,500 for the BHHRA. Specifically, the LWG objects both to EPA's requirement that the LWG pay stipulated penalties and to EPA's right to the stated amount of penalties. The penalty assessment is inconsistent with the Consent Order, EPA guidance, and the federal Administrative Procedure Act and violates the Due Process Clause of the United States Constitution.[4]

Request for Determination

The LWG requests resolution of this dispute in accordance with Sections XVIII and XIX of the Consent Order. As stated above and discussed in more detail below, imposition of stipulated penalties against the LWG furthers no purpose other than to punish cooperating parties for invoking a dispute process they are entitled to use. It certainly does not move forward in a productive manner the process of developing the RI/FS and, most importantly, of restoring the Willamette River. We therefore ask that the penalty assessment be withdrawn.

The LWG requests the opportunity to present oral argument to you on this dispute.

A. Statement of Facts

The LWG submitted the first draft BHHRA in September 2009. EPA provided preliminary comments in December 2009, followed by a complete set of comments in July 2010. The LWG and EPA worked together for six months to resolve the comments. EPA and the LWG reached final written agreements, including some additional EPA direction, as to how to address EPA comments on that document on December 8, 2010 (the "2010 agreements").[5]

On May 2, 2011, the LWG submitted a second draft BHHRA to EPA for review and approval. The LWG prepared this document in accordance with the 2010 agreements. EPA took 14 months to review the May 2011 draft final BHHRA. On June 22, 2012, EPA transmitted to the LWG more than 300 pages of directed redlined revisions to the BHHRA – revisions that EPA acknowledges did not "change the calculations or analysis that made up the majority of the work and effort doing the risk assessment" but were primarily just "words ... moved to other locations and/or redundancies eliminated."[6] EPA's June 22 transmittal also informed the LWG for the first time that EPA considered the LWG to be out of compliance with the Consent Order because

[4] EPA and the LWG have agreed that further discussion of this matter among the project coordinators is unlikely to be productive. At EPA's request, the LWG is consolidating the notice of objection to the project coordinators required by §XVIII.1 with the request for determination to the ECL Director allowed 14 days later.

[5] Later that month, the EPA project coordinator with primary responsibility for the Remedial Investigation and BHHRA for the previous seven years resigned from EPA. EPA's long time human health risk assessor also retired in 2010, resulting in a complete turnover of EPA staff responsible for the BHHRA at what the LWG had previously understood to be the final stages of preparation of the RI and risk assessments.

[6] See note 1, *supra*.

the "LWG has failed to produce a BHHRA of acceptable quality, or otherwise failed to perform in accordance with the requirements of the Order by failing to fully correct all deficiencies and incorporate and integrate all information and comments supplied by EPA on prior versions of the BHHRA." In that notice of noncompliance ("NON"), EPA noted four "deficiencies" in the May 2011 draft, all of which were either contrary to prior EPA direction and the 2010 agreements or were brand new comments EPA had not made on the 2009 draft of the BHHRA. EPA did not explain how it believed that the LWG had violated the Consent Order.

Given the extensive revisions directed by EPA, the LWG asked on June 29, 2012, for an extension of the deadline to invoke dispute to challenge the finding of noncompliance and also the deadline for submission of the revised BHHRA. That same day, EPA sent a letter granting the extension and clarifying that the June 22, 2012, notice triggered the accrual of stipulated penalties, but noted that:

> "'EPA may, at its discretion, waive imposition of stipulated penalties if it determines that Respondents have attempted in good faith to comply with [the Consent Order], or have timely cured defects in initial submissions.' EPA shall make this determination after receipt of the revised BHHRA and it has been determined that the corrections required by EPA have been conducted both timely and completely."

On July 17, 2012—seven days before the LWG's deadline to initiate formal dispute on EPA's directed revisions to the BHHRA —one of EPA's project coordinators contacted the LWG and offered to withdraw the NON if the LWG would agree not to dispute any of EPA's revisions to the BHHRA. The LWG declined because it believed important scientific issues regarding risk that might have a significant impact on remedy selection were raised by the revisions, although, at that time, the LWG still had not been informed which revisions had led to the NON. Faced with EPA's July 24 deadline for initiating dispute, the LWG had no choice but to begin the dispute process in order to challenge EPA's wholesale revision of the BHHRA as well as EPA's still unexplained determination that the LWG was not in compliance with the Consent Order.

Finally, on Friday, July 27, 2012, EPA provided the LWG with its basis for issuing the NON by sending the LWG a list of the 17 EPA comments (of a total of 223 comments) on the 2009 draft BHHRA that EPA contended were not fully addressed in the May 2011 BHHRA.[7] All 17 comments related to language used in the text of the May 2011 BHHRA; none of the comments sought changes to the calculations or technical conclusions. For example, EPA objected to the LWG's insertion of the word "generally" into a sentence describing the results of a fish consumption survey.[8] For seven of the 17 comments, the LWG's alleged deviations from

[7] Cora email to Parkinson (July 27, 2012), attached as Exhibit 3. *See also* Grandinetti email to Wyatt (September 6, 2012), attached as Exhibit 4, confirming that these 17 items comprised the entire basis for the notice of noncompliance.
[8] Exhibit 3, Item 7.

the EPA comments were so minor that EPA did not make the revisions the comments sought in its own redraft of the BHHRA.[9] Only three of the 17 comments had been previously identified by EPA as required "directed changes" to the LWG's 2009 draft BHHRA, rather than as an "issue," a "note," or text that the LWG should "revise" or clarify."[10]

The following Tuesday, July 31, 2012, EPA and the LWG met to discuss EPA's redlined revisions to the May 2011 draft final BHHRA. EPA refused to discuss the notice of noncompliance but did offer to withdraw the notice if EPA and the LWG could reach agreement on EPA's version of the BHHRA. The LWG immediately agreed to work from EPA's version of the document and to focus on major substantive disagreements with EPA revisions to the BHHRA that either had not been raised by EPA in its comments on the 2009 draft of the BHHRA or that were inconsistent with the 2010 agreements.[11] None of the 17 comments identified by EPA on the July 27 list raised an area of major substantive disagreement requiring further discussion, and EPA revisions to address those comments were simply accepted. The total amount of time, therefore, between when the LWG received actual notice of the alleged violations and agreed to accept all the revisions EPA believed necessary to correct those perceived violations was *four days*, including a weekend.

Ultimately, EPA and the LWG were unable to reach agreement on three substantive issues that were inconsistent with the 2010 agreements: (1) Reasonable Maximum Exposure definitions; (2) whether the risk assessment should describe the factual context in which drinking water and clam consumption exposure scenarios were evaluated; and (3) the usefulness of executive summary and conclusion sections for the BHHRA. Therefore, the LWG elevated these three issues to Director Opalski for resolution on September 21, 2012. Despite resolution of all other issues and significant progress toward compromise on these three issues, EPA again declined to withdraw the NON. As a result, the LWG also asked Director Opalski to determine whether EPA was justified in finding the LWG in violation of the Consent Order. The LWG did not contest any of EPA's revisions corresponding to the 17 comments.[12]

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[9] Exhibit 3, Items 3, 6, 7, 8, 9, 15 and 16. See, generally, LWG Reply to EPA Submission (October 24, 2012), attached as Exhibit 5.

[10] Director Opalski later found that the LWG had complied with the Consent Order with respect to two of the three "directed change" comments. *See* Final Resolution (December 6, 2012), attached as Exhibit 6, at p.2.

[11] The agreement to work from EPA's version of the BHHRA was confirmed by email the next day. Wyatt email to Yamamoto (August 1, 2012), attached as Exhibit 7.

[12] Item 2 on EPA's July 27 list was that "RME and CTE identifiers were not incorporated in BHHRA tables." In not including the RME and CT identifiers, the LWG had simply made the BHHRA tables consistent with the text as directed by EPA. In 2004, EPA directed the LWG that fish consumption scenarios in the BHHRA "*will be based on a range of fish consumption rates. Because these consumption rates will not be designated as representing either RME or CT exposures the EPCs for tissue will not be developed specifically for RME or CT scenarios.*" (Letter from EPA to LWG, March 15, 2004, attached as Exhibit 8.) EPA has not alleged that the LWG violated the Consent Order by complying with EPA's 2004 direction not to identify RME or CT scenarios for fish consumption in the 2009 or 2011 drafts of the BHHRA text, only by not including them in the 2011 draft tables. When EPA reversed its position on identifying RME and CT scenarios for fish consumption in 2012, the LWG's disagreement, and the dispute that resulted, was with the details of those scenarios, not with EPA's decision to include them in the text or tables.

Director Opalski's Final Resolution dated December 6, 2012, determined the RME and CT scenarios to be used in the BHHRA, provided direction on inclusion of context language for drinking water and clam consumption scenarios, noted EPA's agreement to include a table of contents and executive summary in the BHHRA, and allowed EPA's non-compliance determination to stand on 13 of the 17 comments.[13]

EPA approved the final BHHRA on April 3, 2013. On April 10, EPA fined the LWG $125,500.

B. Opalski's Decision and EPA's Imposition of Penalties

In upholding the NON for 13 of EPA's 2010 comments, Director Opalski deferred the question of the imposition of stipulated penalties: "I leave it to the Director and Associate Director of the Office of Environmental Cleanup to consider as they deem appropriate the discretion available in Section XIX of the Order on Consent with respect to the imposition of stipulated penalties."

Despite the LWG's good faith effort and expedient agreement during the informal dispute process to accept all of EPA's revisions corresponding to the 17 issues that formed the basis of the NON, EPA issued a notice on April 10, 2013, imposing stipulated penalties of $125,500. EPA stated "the penalty is being assessed for non-compliance with AOC in 2012 and has been reduced substantially in consideration of the good faith attempts of Respondents to comply with the AOC." It then contended that the LWG was out of compliance with the Consent Order from June 22, 2012, to February 11, 2013 (which could have in its view resulted in accrued penalties greater than $1 million)[14] but that it would waive all but 45 days of penalties "due to the good faith attempts Respondents made to comply with the AOC." It provided no justification, much less a factual basis, for determining that the LWG was actually in violation of the Consent Order for 45 days (as opposed to some other length of time) or why, given the parties' cooperative relationship for more than a decade, this level of penalties, or any penalty at all, was necessary, appropriate, or consistent with law.

The LWG asks you to withdraw EPA's notice of assessment and demand for stipulated penalties for the following reasons:

(1) EPA's decision to assess stipulated penalties in the amount of $125,500 for 45 days of noncompliance is arbitrary and capricious because it has no rational connection to the factual record. EPA did not identify the basis for the June 22 NON until July 27, 2012 – three days after the LWG was required

[13] EPA withdrew its complaint about Comment 11, and Director Opalski found in favor of the LWG on Comments 1, 12 and 17. Exhibit 6, p. 2.

[14] LWG disagrees with EPA's contention that it could have assessed more than $1 million in stipulated penalties. Section XIX(4) of the AOC caps the period of time during which stipulated penalties accrue at 90 days.

to invoke dispute. On July 31, 2012, the LWG agreed to resolve those issues by accepting EPA's text revisions to the draft and focusing the dispute resolution process on significant technical or factual issues not arising from the EPA comments cited as the bases for the NON. This arbitrary amount of penalties appears to have been assessed solely to punish the LWG for invoking dispute resolution

(2) EPA's decision to assess stipulated penalties is arbitrary and capricious because (a) it is inconsistent with EPA guidance and (b) the imposition of any amount of penalties is excessive given the significance of the alleged Consent Order violations at issue. The record contains no evidence of, and Director Opalski made no finding of, any harm resulting from the 13 comments forming the basis for the final decision of noncompliance.

(3) EPA's assessment of penalties violates Section IX(4) of the Consent Order and the Due Process Clause of the United States Constitution because it is based on an alleged failure by the LWG to make revisions in response to what EPA had identified as "non-directive" comments.

(4) The stipulated penalties are otherwise unlawful under the Consent Order, under all legal authorities under which it is issued, under the federal Administrative Procedure Act, and under the Due Process Clause of the United States Constitution.

C. Stipulated Penalties Should Be Withdrawn.

1. Assessment of $ Stipulated Penalties is Arbitrary and Capricious and Punishes the LWG for Invoking Dispute.

According to the April 10, 2013, notice of assessment of stipulated penalties, EPA based the assessed penalty of $125,500 on its decision to "reduce" the period of noncompliance from 234 to 45 days. EPA provides no explanation as to how it determined the period of noncompliance or otherwise calculated the penalty amount. Based on the undisputed factual record laid out above, EPA could not find the LWG out of compliance with the Consent Order for 45 days (much less 234).

EPA did not articulate the basis for the NON until July 27, 2012. Before that date, EPA offered to withdraw the NON only if the LWG waived its right to challenge any of the revisions in EPA's June 22 version of the BHHRA. The LWG believed many of those revisions raised important scientific issues relating to risk assessment. If the EPA had informed the LWG that the NON was, in reality, based upon its handling of 17 comments to the 2009 version of the BHRHA that did not raise the same substantive concerns, then the LWG could have addressed those issues expeditiously and cured the alleged noncompliance.

Indeed, as soon as EPA informed the LWG on July 27 of the 17 comments on the "non-compliance list," the LWG immediately agreed on July 31—just four days later—to work from EPA's version of the document and focus dispute resolution on major substantive disagreements with EPA revisions to the BHHRA. Those substantive disagreements were not with revisions addressed by the 17 comments, but with revisions addressing issues either not raised by EPA in its comments on the 2009 draft of the BHHRA or revisions inconsistent with the 2010 agreements resolving those comments. The LWG confirmed this agreement by email on August 1, 2012, stating "the LWG technical team [will] provide EPA with our comments on unacceptable substantive changes made to the Baseline Human Health Risk Assessment by Wednesday, August 15th." The issuance of the NON is not based upon any of the substantive changes then identified by the LWG, and at no point did the LWG challenge or dispute revisions related to the 17 NON comments. Thus, four days after EPA identified 17 comments as the basis of the NON, the LWG agreed in principle to accept all EPA redline revisions related to those comments.

Yet, EPA denied the LWG any opportunity for early resolution of the NON by waiting 35 days after its issuance to articulate the basis for it. The absence of clear communication from EPA is contrary to guidance from EPA's Office of Site Remediation Enforcement ("EPA/OSRE Guidance"),[15] which states that "[c]lear communication with PRPs facilitates timely compliance, reduces the likelihood of disputes, and creates a record for any subsequent enforcement." The LWG can only conclude that EPA was not interested in facilitating "timely compliance" but instead was using the NON as leverage to compel the LWG to make substantive technical changes with which it understood the LWG did not agree and that were contrary to prior agreements between the LWG and EPA.

Stipulated penalties should not be assessed against a party for periods of time during which the agency is unable to articulate the basis for the noncompliance finding, thereby not providing the party the opportunity to cure the noncompliance and stop the accrual of penalties. At most, EPA could say the LWG was out of compliance from July 27 to July 31, a total of four days, two of which were a Saturday and a Sunday. "Reducing" the period of noncompliance to 45 days has no support in the record and is arbitrary and capricious because EPA's analysis is inadequately explained and has no rational connection to the facts.[16] EPA's decision must be founded on a reasoned evaluation of the relevant factors.[17] When one is left to guess as to EPA's rationale, as we are here, then the decision at issue is arbitrary and capricious and must be withdrawn.

Additionally, from a policy perspective, EPA should exercise its discretion and withdraw its assessment of stipulated penalties. The dispute process worked as intended and resulted in EPA's approval of the final BHHRA on April 3, 2013. The 17 comments that formed the basis

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[15] *Options for Responding to Deficient Deliverables from PRPs* (EPA, June 11, 2011), attached as Exhibit 9.
[16] *General Chemical Corporation v. U.S.*, 817 F.2d 844, 857 (D.C.Cir. 1987); *Arizona Cattle Growers' Association. v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001).
[17] *Arizona Cattle Growers' Association*, 273 F.3d at 1236.

for the NON had been resolved many months earlier on July 31, 2012, when the LWG agreed to work from EPA's version of the BHHRA. Even EPA conceded that going through the process contemplated in the Consent Order resulted in the LWG and EPA working through their technical differences and producing a higher quality deliverable.[18] Imposing penalties on parties that try to work collaboratively with EPA to produce high quality documents is not a paradigm for achieving success at the Site. Moreover, as a practical matter, imposition of stipulated penalties against the 14 potentially responsible parties who, out of the 147 PRPs identified by EPA to date, have stepped forward to cooperate with EPA on the remedial investigation and feasibility study furthers no purpose other than to punish the LWG for invoking the dispute process.

2. The Assessment of the Penalty and the Amount of Penalties Assessed Are Inconsistent with Agency Guidance and Are Based on Alleged Violations that Resulted in No Cognizable Harm.

The LWG submitted a technically sound, compliant BHHRA in May 2011, which was based upon years of collaboration and shared agreement with EPA. In its October 12, 2012, submission to Director Opalski, EPA admits that it:

> "had no problem nor did [it] change the calculations or analysis that make up the majority of the work and effort doing the risk assessment. In fact, most of the Respondents' words were retained by EPA, but moved to other locations and/or redundancies eliminated."

Given the nature of the revisions and the lack of any harm, the imposition of a stipulated penalty violates any standard of fairness and demonstrates a hyper-technical reading of the AOC. EPA has the authority to impose stipulated penalties based on a finding of noncompliance, but its own guidance says that in deciding upon an appropriate enforcement response, including the imposition of penalties, it should consider factors such as the "past compliance history of the PRPs (both as to prior obligations at the site and in responding to prior Agency comments on the current deficient deliverable), the degree of deficiency of the submitted deliverable, and the impact of the deliverable on the quality and timeliness of the cleanup."[19] All of the factors weigh against the imposition of any penalties against the LWG.

First, the LWG has a 12-year history of cooperation and compliance with EPA for this site. It is comprised of 14 parties who have cooperatively engaged in this process with EPA. In assessing the stipulated penalties, EPA did not cite any ongoing compliance issues, such as the LWG submitting deficient deliverables or mishandling EPA comments, because no such issues exist.

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[18] Koch email to Wyatt (August 30, 2012) attached as Exhibit 10.
[19] *See* Exhibit 9, pp 1-2.

Second, the degree of deficiency, if any, is minimal when put into the context of the entire BHHRA. The revisions related to the 17 comments were editorial in nature. Indeed, only five of EPA's June 22 revisions corresponded to the 17 comments. Four of the 17 comments were withdrawn by EPA or Director Opalski; EPA's directed revisions did not include text revisions previously sought by seven of the comments; and one comment was on the executive summary, which was deleted entirely by EPA (although the EPA had previously instructed the LWG to include an executive summary in the BHHRA). Yet, Director Opalski concluded that "even a single comment being addressed inadequately can be the basis for a determination of noncompliance."[20] Such a standard sets the bar for noncompliance so low that a disagreement about one comment unrelated to data from the site could lead (indeed, may have led) to the absurd result of penalties being assessed because the LWG inserted the word "generally" in a sentence.[21] The inherent unfairness of the "even a single comment" standard becomes obvious when considering the fact that EPA itself made numerous mistakes of varying degrees of importance in its June 22 version of the BHHRA.[22] Yet, EPA reserves its power to impose monetary penalties on cooperating parties for a single failure to comply with minor requested revisions.

EPA offers no rationale either to justify this "even a single comment" standard as a basis for penalties or to explain why the 17 comments here, even when viewed as a whole, rise to the level of necessitating stipulated penalties. Again, EPA has chosen not to disclose full information about its rationale to the LWG, thereby impairing its ability to provide specific objections to EPA's decision. As a result, one can only wonder whether EPA chose a hyper-technical reading of the Consent Order, or carefully considered the degree of deficiency of the 17 comments at issue either individually or *in toto*. Did it accept the "even a single comment" standard as justifying this penalty?[23] Did it consider EPA's practice, in reviewing the 2009 draft BHHRA and other LWG deliverables over many years, of identifying to the LWG whether its comments directed specific revisions to language in the BHHRA or were merely requests for clarification? Did it evaluate whether the final BHHRA incorporated the same language that it had earlier claimed as the basis for noncompliance? If it had performed this analysis, it would have discovered, for example, that for seven of the 17 comments, it decided not to incorporate its own revisions in the approved document.

Unsupported and unmerited assertions of noncompliance not only are contrary to EPA's guidance but also are arbitrary and capricious. Again, if an agency's analysis is internally inconsistent and inadequately explained, the agency's decision is arbitrary and capricious.[24]

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[20] Exhibit 6, p. 4.
[21] Exhibit 3, Item 7.
[22] For example, EPA's June 22 redline mistakenly defined the Portland Harbor Study Area as River Miles 0.8 to 12.2, rather than RM 1.9 to 11.8, which expanded the Study Area by 1.5 miles from the area evaluated in the Remedial Investigation.
[23] EPA's "even a single comment" standard for noncompliance and penalties is equally problematic for performance of further work at the Site, including for orders or consent decrees to implement hundreds of millions of dollars of cleanup work.
[24] *General Chemical Corporation*, 817 F.2d 844 at 857.

When assessing whether an agency violated the arbitrary and capricious standard, the factfinder is to determine whether the agency articulated a rational connection between the facts found and the choice made. The agency decision must be founded on a reasoned evaluation of the relevant factors.[25]

Third, the revisions at issue had no impact on the "quality and timeliness of the cleanup."

EPA's assessment of $125,500 in stipulated penalties based upon the final determination that the LWG failed to address adequately 13 of EPA's 223 July 2010 comments is unprecedented and grossly disproportionate when compared to the imposition of administrative penalties assessed by Region 10 in other cases during the same time period. Between January 1, 2010 and April 12, 2013, EPA Region 10 did not assess a single stipulated penalty under a CERCLA administrative order or Federal Facility Agreement other than this penalty to the LWG.[26]

Since 2007, Region 10 has assessed only four[27] other administrative penalties as CERCLA cases, the largest of which, for an unreported spill of 50,000 gallons of hazardous wastewater into a storm drain, was less than half of the penalty assessed to the LWG for failing to make 13 requested text edits:

Respondent	Violation	Administrative Penalty
Ennis Paint (2007)[28]	Failure to report release of 725 pounds xylene	$4,257
US Dept of Energy and CH2M Hill (2008)[29]	Failure to report release of 116 gallons of mixed radioactive waste	$6,800
Industrial Plating Corp (2010)[30]	Failure to report release of 50,000 gallons of hazardous wastewater into storm drain	$60,000
Pacific Seafood Group (2010)[31]	Failure to report 210 pound ammonia release	$6,645

Between January 1, 2012 and today, Region 10 has assessed 155 administrative civil penalties under all statutes it administers, only nine of which were greater than the penalty it assessed to

[25] *Arizona Cattle Growers' Association*, 273 F.3d at 1236.
[26] May 29, 2013 oral communication from Lori Cora in response to an April 12, 2013 LWG FOIA request.
[27] EPA often alleges violation of CERCLA §103 in conjunction with EPCRA reporting violations. The LWG has not attempted to segregate penalties that may be allocable to CERCLA violations within cases identified by EPA as EPCRA complaints.
[28] CERCLA-10-2007-0177
[29] CERCLA-10-2008-0064
[30] CERCLA/EPCRA-10-2010-0112
[31] CERCLA/EPCRA-10-2010-0149

the LWG. In every one of these nine cases, the violations EPA alleged resulted in real environmental damage or significant risk to public health:

Respondent	Violation	Administrative Penalty
Burlington Environmental[32]	72 RCRA violations at TSD facility, including mismanagement of incompatible wastes resulting in fires	$275,000
IBC Manufacturing Company[33]	Distribution and sale of 153 misbranded pesticides	$265,000
US Ecology[34]	RCRA TSD failed to file toxic release and inventory reports for multiple chemicals and wastes	$184,400
Alaska Gold[35]	Major Clean Water Act violations from mining operations impacting three creeks.	$177,500
Avista[36]	1314 Clean Water Act violations into Clark Fork River	$172,000
US Department of Navy[37]	37 violations of UST leak and spill prevention requirements at Kitsap naval base	$160,756
US Department of Energy[38]	Illegal storage and disposal of mixed radioactive waste in trenches at Hanford	$136,000
Dovex Fruit Company[39]	Failure to prepare risk management plans and comply with other RMP requirements over multiple years	$134,613
Sierra Pacific Industries[40]	Failure to file Toxic Release	$129,000

[32] RCRA-10-2012-0012
[33] FIFRA-10-2012-0208
[34] EPCRA-10-2012-0080
[35] CWA-10-2012-0152
[36] CWA-10-2012-0044
[37] RCRA-10-2012-0028
[38] RCRA-10-2013-0113
[39] CAA-10-2012-0194

	Inventory Reports over multiple years	

Indeed, many cases resulting in actual environmental damage or risk to the public resulted in fines well below the penalty assessed to the LWG. EPA assessed the North Idaho Correctional Institution $56,000 for 4,101 NPDES permit violations at Lawyer Creek.[41] Princess Cruise Lines received a fine of $20,000 for discharge of chlorine into Glacier Bay National Park.[42] EPA fined Residential Property Management of Idaho a mere $6,800 for leasing 17 residential units suspected to contain lead paint without warning or disclosure to the tenants.[43] Carson Oil was fined $29,843 for a spill of diesel into Coos Bay that contaminated oyster beds,[44] and Nielsen Brothers paid a penalty of $11,000 for a 120 gallon diesel spill into the South Fork of the Nooksack River.[45] Closer to home, EPA assessed Tyree Oil just $27,920 for multiple violations of the Clean Water Act at two facilities, *including a spill of oil into the Willamette River that left a sheen on the river for three days.*[46]

The LWG, by contrast, is alleged to have failed to make 13 text modifications to a document that is now sitting on a shelf, while the LWG, other PRPs, and the community at large wait for EPA to complete its review of the LWG's 2011 draft final Remedial Investigation report, the 2013 final draft of the Baseline Ecological Risk Assessment, and the 2012 draft Feasibility Study. By putting the word "generally" in a sentence,[47] or stating that "the BHHRA [has] a margin of conservatism built into the risk conclusions consistent with EPA guidance,"[48] the LWG did not harm the environment, or risk public health, or delay completion of the RI/FS by even a single day.

EPA guidance recognizes "the fair and equitable treatment of the regulated community" as an important goal for penalty assessment: "The consistent application of a penalty policy is important because otherwise the resulting penalties might be seen as being arbitrarily assessed."[49] The Administrative Procedure Act also requires an agency to treat similarly-situated parties alike or provide an adequate explanation for disparate treatment.[50] Further, "[p]enalties for noncompliance should be higher when actual harm occurs as a result of the noncompliance. Higher penalties are also appropriate when site conditions pose an immediate threat to human

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[40] EPCRA-10-2013-0052
[41] CWA-10-2012-0016
[42] CWA-10-2013-0001
[43] TSCA-10-2013-0018
[44] CWA-10-2013-0012
[45] CWA-10-2012-0124
[46] CWA-10-2013-0035
[47] Exhibit 3, Item 7.
[48] Exhibit 3, Item 5.
[49] *EPA General Enforcement Policy* #GM – 21 (February 16, 1984), attached as Exhibit 11, at p. 4,
[50] *Burlington Northern & Santa Fe Railway v. Surface Transportation Board*, 403 F.3d 771, 776 (D.C. Cir. 2005); *Hansen v. Salazar*, 2013 WL 1192607 at *7 (W.D. Wash. 2013).

health or the environment."[51] As discussed above, EPA assessment of any penalty to the LWG under the circumstances is unwarranted; a penalty that is – without explanation – among the highest assessed by the Region in recent years and more than five times the magnitude of EPA penalties assessed for actual pollution of the Willamette River should be withdrawn as arbitrary and capricious and inconsistent with EPA guidance.

Finally, EPA may contend that stipulated penalties are justified by Director Opalski's conclusion that, taken as a whole, the deficiencies identified by EPA "pointed to a tendency in the original draft toward language that downplays risk or overemphasizes the conservativeness of the risk assessment."[52] Based upon its close examination of each of the 17 comments that EPA said provided for the basis for the NON, the LWG strongly disagrees with this characterization of language in the May 2011 BHHRA related to the 17 comments on which the NON is based.

Notably, the most significant risk characterization issues addressed during the dispute process – reasonable maximum exposure scenario for fish consumption, clam consumption, and potential for drinking water use – were not included on EPA's July 27 list of 17 comments.

Moreover, Director Opalski's description is clearly undermined by the fact the EPA used identical or substantially similar language as the LWG in both its June 2012 revised BHHRA and the approved 2013 final BHHRA for Comments 3, 7 and 12. Other items reflect non-material misunderstandings or less than clear instructions from EPA on how to revise text, i.e., how PBDE, EPCs, RMEs (other than fish consumption) should be incorporated in text, tables, and figures (Comments 1 and 2); the distinction between uncertainty and modifying factors (Comment 4); why certain samples were not used for screening (Comment 6); how to describe the way background concentrations of arsenic contribute to risk (Comment 8); how to identify the location of samples of depurated and nondepurated clams (Comment 9); general statements about the cumulative effect of assumptions (Comment 10); effect of using the maximum concentration to represent exposure (Comment 13); guidance on use of N-qualified data (Comment 14); limitations regarding the City of Portland's sediment data (Comment 15); and the description of uncertainties associated with toxicity values for PCBs (Comment 16).

The editorial nature of the comments at issue is best illustrated by Comment 17 which goes to the fact that at EPA's direction, the LWG removed the phrase "every day of every year" in connection with fish consumption rates in five places but inadvertently failed to remove it in one section. An inadvertent editing mistake cannot be characterized as a pattern by the LWG of downplaying risk. Any assertion by EPA that these issues justify its assessment of any penalty, let alone a $125,500 penalty, is overreaching and without merit.

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[51] *Interim Policy on Settlement of CERCLA Section 106(b)(1) Penalty Claims and Section 107(c)(3) Punitive Damages Claims for Noncompliance with Administrative Orders* (OSWER, September 30, 1997), attached as Exhibit 12, at p. 4.

[52] Exhibit 6, p. 4.

3. EPA Violated the Consent Order and the LWG's Due Process Rights by Imposing Penalties for Non-Directed Comments.

Director Opalski found that the LWG failed to comply with Section IX(1) of the Consent Order because the LWG failed to "address all directed and non-directed comments."[53] Section IX(4), however, allows for the assessment of stipulated penalties only when a revised submittal does not "fully reflect EPA's *directions* for change." (emphasis added). Director Opalski found that the LWG failed to address fully only a single "directed" EPA comment.[54] As discussed above, EPA has declined to explain the basis for its penalty assessment; in the absence of such an explanation, the LWG can only assume that the penalty assessment is based, at least in part, on the 12 non-directed comments for which the NON was upheld. Such an assessment is inconsistent with the express language of the Consent Order.

The phrase "EPA's directions for changes" is linked to a key phrase used repeatedly in the Consent Order that describes how deliverables are drafted, reviewed, and finalized: If EPA "disapproves of or requires revisions" to a specified document or deliverable, the LWG shall provide a revised version "which is responsive to the *directions* in all EPA comments" (emphasis added). Since 2001, EPA and the LWG have engaged in extensive back and forth on numerous deliverables, and throughout that time EPA routinely distinguished between "directed comments" and "non-directed comments." EPA and the LWG worked cooperatively to resolve all EPA comments, but when the parties were unable to agree on the resolution of a particular comment, EPA would identify "directed" changes. Based on more than a decade of communication with EPA's project managers, the LWG understood that "directed comments" were the changes that EPA mandated.

To be clear, this practice was the practice of the parties as applied by the EPA project coordinator with primary responsibility for the BHHRA before his resignation in December 2010, and LWG reasonably expected it would apply to EPA comments on the 2009 draft BHHRA. EPA certainly gave no indication to the contrary prior to the change in personnel. As with any agreement, the parties' course of dealing under the Consent Order over many years is persuasive evidence of their joint interpretation of the Order.[55]

The assessment of stipulated penalties for non-directed changes not only violates the Consent Order itself, but also is inconsistent with fair notice requirements under the Due Process Clause of the federal constitution, which "prohibits a federal agency from enforcing an interpretation of a regulation that is not 'ascertainably certain.'"[56] A regulatory agency supplies fair notice "[i]f, by reviewing the regulations and other public statements issued by the agency, a

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[53] Exhibit 6, p. 3.

[54] NON Item 3 is based upon EPA's direction to revise text to read, "Although fishers normally fish and/or collect those resources that are available in their area, it is not known to what extent fishers would substitute alternative local types of shellfish." *See* Exhibit 6. The LWG's 2011 revision (based upon the 2010 agreements) read, "It is not known to what extent fishers substitute alternative local types of shellfish." EPA's June 2012 version retains the LWG text.

[55] *Yogman v. Parrot*, 325 Or. 358, 364, 937 P.2d 1019 (1997).

[56] *General Elec. Co. v. United States EPA*, 53 F.3d 1324, 1328 D.C.Cir.1995).

regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform...."[57] However, when an agency "provide[s] no pre-enforcement warning, effectively deciding to use a citation [or punishment] as the initial means for announcing a particular interpretation," constitutional questions are raised about fair notice to regulated parties.[58]

EPA's consistent practice for many years of identifying "directed" and "non-directed" comments is the complete opposite of EPA's current enforcement position that non-directed comments can be the basis for assessment of a penalty. EPA gave no pre-enforcement warning or "fair notice" to the LWG of this significant change in its interpretation of the Consent Order. Absent fair warning of EPA's interpretation, the LWG cannot be assessed penalties for its handling of non-directed comments.[59]

Conclusion

For all of the reasons discussed in this letter, we believe that EPA's April 10, 2013 stipulated penalty assessment against the LWG was improper and should be withdrawn. The penalty is inconsistent with the Consent Order, with EPA guidance and prior practice, and with law. No environmental harm, risk to public health, or delay in completion of the RI/FS resulted from the minor semantic disagreements on which EPA bases the penalty. In such circumstances, the penalty appears retaliatory and will discourage potentially responsible parties from cooperating with EPA at Portland Harbor.

Sincerely,

The Lower Willamette Group

cc: Lori Cohen, Associate Director, Office of Environmental Cleanup, US EPA Region 10
Lori Cora, Assistant Regional Counsel, US EPA Region 10

Enclosures: Exhibits 1-12

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[57] *Id.* at 1329.
[58] *Id.*
[59] *Id.* at 1334 (concluding that a regulated entity may not punished by an agency when the agency has failed to provide fair warning of its interpretation of its regulations).